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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the Marriage of:	2 CA-CV 2010-0065
	DEPARTMENT B
KEVIN S. SAWCHUK,	
	MEMORANDUM DECISION
Petitioner/Appellee,	Not for Publication
	Rule 28, Rules of Civil
and	Appellate Procedure
CYNTHIA E. SAWCHUK,	
Respondent/Appellant.	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. D20081075

Honorable Sarah R. Simmons, Judge

AFFIRMED

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K E L L Y, Judge.

¶1 Kevin and Cynthia Sawchuk were married in 1987 and had two minor children at the time of dissolution. Kevin petitioned for dissolution of the marriage in March 2008. After a bench trial, the trial court dissolved the marriage, divided the couple's property, assigned the debts, and awarded the parties joint legal custody of the children, with each parent having primary physical custody of one child. The court also ordered Kevin to pay Cynthia monthly child support of $83.00. This appeal followed.

Discussion

¶2 Preliminarily, the transcripts of the dissolution proceedings have not been made part of the record on appeal. As the appellant, Cynthia was obligated to "mak[e] certain the record on appeal contains all transcripts or other documents necessary for us to consider the issues raised." *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995); *see also* Ariz. R. Civ. App. P. 11(b). In the absence of the transcripts, we will presume they support the trial court's factual findings and rulings, *Kohler v. Kohler*, 211 Ariz. 106, n.1, 118 P.3d 621, 623 n.1 (App. 2005), and we address Cynthia's claims accordingly.

I. Child support

¶3 Cynthia first maintains the trial court abused its discretion by not ordering Kevin to pay retroactive child support. After the bench trial, the court granted Cynthia primary physical custody of both children and ordered Kevin to pay $692.00 per month in child support. The court subsequently amended its minute entry ruling to state that the child support was to be effective from April 1, 2009. By the time the final decree was entered in January 2010, one of the children was living with Kevin and the trial court

reduced the amount of child support to $83.00 per month. "Child support awards are within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." *State ex rel. Dep't of Econ. Sec. v. Ayala*, 185 Ariz. 314, 316, 916 P.2d 504, 506 (App. 1996).

¶4 Section 25-320(B), A.R.S., provides:

> If child support has not been ordered by a child support order and if the court deems child support appropriate, the court shall direct, using a retroactive application of the child support guidelines to the date of filing a dissolution of marriage, legal separation, maintenance or child support proceeding, the amount that the parents shall pay for the past support of the child and the manner in which payment shall be paid, taking into account any amount of temporary or voluntary support that has been paid. Retroactive child support is enforceable in any manner provided by law.

Cynthia argues that because there had been no support order in place until after the trial and because the trial court ultimately found it appropriate to order Kevin to pay child support, the court should have awarded her retroactive child support starting from the date Kevin filed the dissolution petition.

¶5 As Kevin points out, however, § 25-320(B) requires the court to "tak[e] into account any amount of temporary or voluntary support that has been paid." And, in the absence of a transcript, we cannot determine whether the parties had presented evidence at trial that temporary or voluntary support had been paid. We thus presume the evidence that was before the trial court supported its decision not to award Cynthia retroactive child support. *See Kohler*, 211 Ariz. 106, n.1, 118 P.3d at 623 n.1.

II. Jurisdiction to enter order dividing funds

¶6 Cynthia further contends the trial court "exceeded its jurisdiction in entering orders pertaining to" certain funds that she had withdrawn from a joint account without accounting for them. She maintains that because the parties did not raise the division of these funds as an issue in their respective pretrial statements and because no accounting had been made of the funds, the court lacked jurisdiction to divide them. We review de novo whether the trial court had jurisdiction to enter the order.[1] *See Danielson v. Evans*, 201 Ariz. 401, ¶ 36, 36 P.3d 749, 759 (App. 2001).

¶7 As Cynthia argues, pretrial statements are binding on the parties and "control[] the subsequent course of the action unless modified at trial to prevent manifest injustice." *Gertz v. Selin*, 11 Ariz. App. 495, 498, 466 P.2d 46, 49 (1970), *see also* Ariz. R. Civ. P. 16(d). But, Cynthia's pretrial statement included as an issue "the distribution of the remainder of the community property" after Cynthia was awarded the couple's home. Furthermore, Kevin listed the joint account in the inventory of properties and debts attached to his pretrial statement.[2] Thus, the issue of division of the couple's community property, including these funds, was properly before the trial court. Even if

[1]We take no position as to whether the application of Rule 16, Ariz. R. Civ. P., actually deprives the trial court of jurisdiction or whether it acts as a procedural bar. Because both positions raise an issue of law, our review would be de novo in either case.

[2]The balance listed in Kevin's inventory does not include the funds at issue here as they were apparently spent before trial. Cynthia has cited no authority to support the proposition that this would deprive the court of jurisdiction over the account. Rather, she cites only *Ramsay v. Wheeler-Ramsay*, 224 Ariz. 467, ¶ 13, 232 P.3d 1249, 1253-54 (App. 2010), in which the court simply noted that the parties had agreed about the balance in their joint account in their joint pretrial statement.

that were not the case, however, because the transcripts of the trial are not before us, we do not know if the trial court modified the statements to prevent an injustice, as it is entitled to do. *See Selin*, 11 Ariz. App. at 498, 466 P.2d at 49. And, insofar as Cynthia contends the court's division was unfair or unsupported by the evidence, we cannot agree in the absence of a transcript of the proceedings. *See Kohler*, 211 Ariz. 106, n.1, 118 P.3d at 623 n.1.

III. Allocation of property and debts

¶8 Finally, Cynthia argues the trial court abused its discretion in dividing the couple's property and debt. She asserts that because "[t]he evidence does not support a judgment for waste pursuant to A.R.S. § 25-318(C),"[3] the court should not have ordered her to pay Kevin a share of funds she had withdrawn from a joint savings account. She also maintains the court abused its discretion because "[Kevin's] portion [of community property] was $3,050 greater than [hers]." "The trial court's apportionment of community property will not be disturbed on appeal absent an abuse of discretion." *Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 5, 972 P.2d 676, 679 (App. 1998).

¶9 Initially, we note that "A.R.S. § 25-318 requires a court to divide property and debt *equitably*, not to divide the property with arithmetic precision." *Ramsay v. Wheeler-Ramsay*, 224 Ariz. 467, ¶ 33, 232 P.3d 1249, 1257 (App. 2010). And again, in the absence of a transcript, we must presume that the evidence presented at the trial

[3]It is not clear on the record before us whether the trial court actually found there had been waste of community assets. Rather it appears to have simply credited the funds to Cynthia's share of community property because they were unaccounted for.

supported the trial court's division of the assets and liabilities. *See Kohler*, 211 Ariz. 106, n.1, 118 P.3d at 623 n.1.

Disposition

¶10 The judgment of the trial court is affirmed. Kevin requests an award of attorney fees and costs on appeal, but fails to specify a statutory basis for such an award. We therefore deny the request for fees. *See Bank One, Ariz., N.A. v. Beauvais*, 188 Ariz. 245, 251-52, 934 P.2d 809, 815-16 (App. 1997). As the prevailing party on appeal, however, Kevin is entitled to recover his costs on appeal pursuant to A.R.S. § 12-341. We award him those costs upon his compliance with Rule 21, Ariz. R. Civ. App. P.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge